Sharma Kumari a/p Oam Parkash v Public Prosecutor

HIGH COURT (KUALA LUMPUR) — CRIMINAL APPLICATION NO 44–22 OF 2000

ABDUL WAHAB J

9 MAY 2000

Criminal Procedure *— Sentence — Stay of execution pending appeal — Exercise of judicial discretion — Notice of appeal filed — Applicant must show grounds and particulars amounting to good reasons for appeal — Burden of proof on applicant not lightly discharged by unsupported assertions — Undertaking to attend court when required — Whether stay should be granted*

The applicant was charged under s 199 of the Penal Code. After the prosecution's case, the magistrate had decided not to call for the defence but on appeal, the High Court overruled the magistrate's decision. Another magistrate at the defence stage had succeeded the magistrate who heard the prosecution case and convicted the applicant. The applicant had applied by way of a notice of motion for a stay of execution of the sentence of imprisonment pending appeal against the conviction and the sentence. The notice of motion was filed on 3 May 2000 and was supported by the affidavit of the applicant affirmed on 3 May 2000. It was heard on 9 May 2000. The issue raised was whether the application for stay of execution pending appeal should be granted. In the applicant's affidavit, the applicant averred, inter alia, that the magistrate who decided the case did not have the opportunity to hear the evidence of the material witnesses; that the case involved difficult points of law; and gave an undertaking to attend court as and when required.

Held, dismissing the application for a stay of execution of the sentence of imprisonment:

(1) The court has a discretion in granting a stay of execution. However, a stay of execution should not be granted and will not be granted unless there are special reasons for so doing, and the mere fact that a notice of appeal has been given is not sufficient reason (see p 853C).

(2) The mere fact that an applicant had been advised and verily believed he had good reasons for appeal does not constitute grounds for releasing an appellant pending appeal. An applicant must show the grounds and particulars for his good reasons for appeal, so that the court to which the application was made would be able to decide for itself whether the applicant has good reasons: (i) for his appeal; and (ii) for releasing him pending appeal (see p 853C-D, F).

(3) Failure of the prosecution to object would not mean that the prosecution had not shown any grounds in the public interest why bail pending appeal should not be granted (see p 853F). A

(4) In an adversarial system, the solicitor for the accused and the deputy public prosecutor must, at the end of the case whether, in view of the fact the magistrate at the defence stage had succeeded another magistrate who heard the prosecution case, decide whether to apply under s 425 of the Criminal Procedure Code to recall and re-examine those witnesses whose re-examination was essential to the just decision of the case. But the mere fact the magistrate at the defence stage was different from the magistrate at the prosecution stage, of and by itself, was not a determining consideration. The real issue, to which no averment was made, was whether the credibility of the witnesses were in fact serious issues that would affect the outcome of the case, and whether their demeanour were relevant to that issue of credibility (see p 857B–C). B C

(5) Failure of the applicant to state what the points of law were made it impossible to decide what the points of law were, and hence, the applicant had failed to satisfy the court whether those points of law were good grounds for the grant of a stay (see p 857E–F). D

(6) The mere fact one has money to ensure attendance does not justify a stay of a sentence of imprisonment if there were otherwise no other good grounds for a stay (see p 857H–I). E

(7) Section 114 illustration (e) of the Evidence Act 1950 allows a court to presume that judicial acts have been regularly performed. Thus unless it is set aside by a successful appeal, that judgment remains valid and in force. In such circumstances, the burden was clearly upon the applicant to show that there were good grounds why a stay ought to be granted against that court's order. It is not a burden that is lightly discharged by assertions not backed up or supported by evidence (see p 858C–D). F

Obiter dicta: G

Applicants by notice of motion would serve their interests better by observing the requirements of O 8 r 3(1) of the Rules of the High Court 1980 which specifies the use of Form 9. The assertions in the supporting affidavit as grounds ought to be set out in the notice of motion itself (see p 858A–B). H

[Bahasa Malaysia summary

Pemohon telah dituduh di bawah s 199 Kanun Keseksaan. Selepas kes pendakwaan, majistret telah berkeputusan untuk tidak memanggil pembelaan tetapi atas rayuan, Mahkamah Tinggi telah mengakaskan keputusan mahkamah majistret. Seorang lagi majistret di peringkat pembelaan telah menggantikan majistret yang mendengar kes pendakwaan dan telah mensabitkan pemohon. Pemohon telah I

memohon melalui notis usul untuk penangguhan pelaksanaan hukuman pemenjaraan sehingga rayuan terhadap sabitan dan hukuman. Notis usul telah difailkan pada 3 Mei 2000 dan disokong oleh afidavit pemohon yang diikrarkan pada 3 Mei 2000. Ia telah didengar pada 9 Mei 2000. Isu yang dibangkitkan adalah sama ada permohonan untuk penangguhan pelaksanaan sehingga rayuan patut diberikan. Di dalam afidavit pemohon, pemohon menegaskan, antara lain, bahawa majistret yang telah memutuskan kes tersebut tidak mempunyai peluang untuk mendengar keterangan saksi-saksi yang material; bahawa kes melibatkan persoalan undang-undang yang sukar; dan memberikan suatu akujanji untuk hadir di mahkamah jika dan bila diperlukan.

Diputuskan, menolak permohonan untuk penangguhan pelaksanaan hukuman pemenjaraan:

(1) Mahkamah mempunyai bidang kuasa untuk menangguhkan pelaksanaan. Namun, suatu penangguhan pelaksanaan tidak sepatutnya dibenarkan dan tidak akan dibenarkan kecuali terdapat sebab-sebab khas untuk berbuat demikian, dan semata-mata fakta bahawa suatu notis rayuan telah diberikan adalah tidak memadai (lihat ms 853C).

(2) Fakta semata-mata bahawa seorang pemohon telah dinasihatkan dan sesungguhnya mempercayai beliau mempunyai alasan-alasan yang baik untuk rayuan tidak terjumlah kepada alasan-alasan untuk membebaskan perayu sehingga rayuan. Pemohon mestilah menunjukkan alasan-alasan dan butir-butir menyokong alasan-alasannya untuk rayuan, agar mahkamah di mana permohonan dibuat boleh memutuskan dengan sendiri sama ada pemohon mempunyai alasan-alasan yang baik: (i) untuk rayuannya; dan (ii) untuk membebaskannya sehingga rayuan (lihat ms 853C–D, E).

(3) Kegagalan pihak pendakwaan untuk membantah tidak bermaksud bahawa pihak pendakwaan telah menunjukkan sebarang alasan-alasan dari segi kepentingan awam mengapa ikat jamin sehingga rayuan sepatutnya dibenarkan (lihat ms 853F).

(4) Di dalam sistem pertentangan (adversarial), peguam untuk tertuduh dan timbalan pendakwa raya mestilah, di akhir kes sama ada, memandangkan fakta bahawa majistret semasa peringkat pembelaan menggantikan majistret yang lain yang telah mendengar kes pendakwaan, memutuskan sama ada untuk memakai s 425 Kanun Acara Jenayah untuk memanggil semula dan memeriksa semula saksi-saksi tersebut di mana pemeriksaan semula adalah perlu bagi keputusan adil kes tersebut. Tetapi fakta semata-mata majistret tersebut semasa peringkat pembelaan adalah berlainan daripada majistret semasa peringkat pendakwaan, dengan sendirinya, bukanlah pertimbangan penentu. Isu sebenar, di mana tiada penegasan dibuat, adalah

sama ada kebolehpercayan saksi-saksi adalah secara fakta isu yang serius yang akan menjejaskan keputusan kes, dan sama ada tingkah laku mereka adalah relevan kepada isu kebolehpercayaan (lihat ms 857B–C).

(5) Kegagalan pemohon untuk menyatakan apakah hujahan-hujahan undang-undang menjadikannya mustahil untuk memutuskan apakah hujahan-hujahan undang-undang tersebut, dan dengan itu, pemohon telah gagal untuk memuaskan mahkamah sama ada hujahan-hujahan undang-undang tersebut adalah alasan-alasan yang baik untuk pemberian penangguhan (lihat ms 857E–F).

(6) Fakta semata-mata bahawa seseorang mempunyai wang untuk memastikan kehadiran tidak menjustifikasikan penangguhan hukuman pemenjaraan jika tiada alasan baik yang sebaliknya untuk penangguhan (lihat ms 857H–I).

(7) Seksyen 114 contoh (e) Akta Keterangan 1950 membenarkan mahkamah untuk mengandaikan bahawa tindakan-tindakan kehakiman telah dilaksanakan dengan teratur. Dengan itu kecuali ia diketepikan dengan rayuan yang berjaya, penghakiman tersebut kekal sah dan terus berkuatkuasa. Di dalam keadaan-keadaan sedemikian, beban adalah jelas di atas pemohon untuk menunjukkan bahawa terdapat alasan-alasan yang baik di mana suatu penangguhan patut dibenarkan terhadap perintah mahkamah. Ia bukanlah suatu beban yang ringan untuk dilepaskan dengan penegasan-penegasan yang tidak didasarkan atau disokong dengan keterangan (lihat ms 858C–D).

Obiter dicta:

Pemohon-pemohon melalui notis usul akan dapat menegakkan kepentingan mereka dengan lebih baik jika mematuhi keperluan A 8 k 3(1) Kaedah-Kaedah Mahkamah Tinggi 1980 yang menentukan penggunaan Borang 9. Penegasan-penegasan di dalam afidavit sokongan sebagai alasan-alasan patutlah dibentangkan di dalam notis usul itu sendiri (lihat ms 858A–B).]

Notes

For a case on stay of execution of sentence pending appeal, see 5 *Mallal's Digest* (4th Ed, 1997 Reissue) para 3008.

Cases referred to

Balasingham v PP [1959] MLJ 193 (refd)
Doraisamy s/o Palanimuthu v PP High Court, Kuala Lumpur Criminal Appeal No 2 of 1954 (unreported) (refd)
Ganesan P Awanthan v PP [1983] 2 MLJ 369 (refd)
Kwan Wah Yip, Re & Anor [1954] MLJ 146 (refd)
Mohamed Razip Fadzillah v PP & Ors [1988] 1 MLJ 84 (refd)
PP v Dato Seri Anwar Ibrahim [1998] 4 MLJ 481 (refd)

A *PP v Dato Seri Anwar Ibrahim (No 3)* [1999] 2 MLJ 1 (refd)
PP v Loo Choon Fatt [1976] 2 MLJ 256 (refd)
Suhaili bin Hj Chuchu v PP [1983] 2 MLJ 424 (refd)
Tan Tee v R [1948] MLJ 153 (refd)

B **Legislation referred to**

Criminal Procedure Code (Cap 21) s 305
Criminal Procedure Code ss 193, 199, 261, 311, 425
Evidence Act 1950 s 114, illustration (e)
Rules of the High Court 1980 O 8 r 3(1), Form 9

C *V Sithambaram* (*C Vijayakumar*, *S Kulasegaran* and *M Athimulam* (*S Kula & Co*) for the appellant.
Zauyah Bee bte Loth Khan (Deputy Public Prosecutor) for the respondent.

Abdul Wahab J: The applicant had applied by way of this notice of motion
D for orders as follows:

(a) bahawa penangguhan perlaksanaan terhadap hukuman yang dikenakan oleh Mahkamah Majistret 1B Kuala Lumpur dalam kes tangkap No A83–237–99 pada 25 April 2000 di mana pemohon dipenjarakan selama tiga tahun dari 25 April 2000 untuk setiap satu
E daripada pertuduhan tersebut yang mana hukumannya akan berjalan secara serentak, dibenarkan sehingga rayuan terhadap sabitan dan hukuman diputuskan oleh mahkamah yang mulia ini; dan

(b) lain-lain perintah yang dianggap sesuai dan adil.

On the face of it, applications for a stay of execution presents some difficulty
F since the court before which the application is made usually has only the application and the affidavit. This was the case in this notice of motion. The notice of motion was filed on 3 May 2000 and was supported by the affidavit of the application affirmed on the 3 May 2000. It was heard on 9 May 2000. Thus the Respondent hardly had time to file an affidavit in reply. An early date is given in order firstly to find out if the respondent
G intends to file an affidavit in reply, in which case an adjournment is usually given, and secondly if the respondent does not intend to file a reply, the application would be heard immediately so that an applicant who has good reason to be released on bail would be granted a stay of execution without delay.

H A stay of execution is applied for under s 311 of the Criminal Procedure Code ('the CPC') which provides:

> Stay of execution pending appeal
>
> Except in the case of a sentence of whipping (the execution of which shall be stayed pending appeal), no appeal shall operate as a stay of execution, but the
I Court below or a Judge may stay execution on any judgment, order, conviction or sentence pending appeal, on such terms as to security for the payment of any money or the performance or non-performance of any act or the suffering of any punishment ordered by or in such judgment, order,

> conviction or sentence as to the Court below or to such Judge may seem reasonable. A

The grant of a stay of execution is a matter of discretion (see *Ganesan P Awanthan v PP* [1983] 2 MLJ 369). It should be applied for in the first instance in the court that passed the sentence (see *Mohamed Razip Fadzillah v PP & Ors* [1988] 1 MLJ 84), and if refused, an application may be made before the court to which an appeal is made. The basic guideline as to a stay of execution is expressed in s 311 of the CPC, that except in the case of a sentence of whipping, a stay shall not operate as a stay of execution. *Mallal's Criminal Procedure* (4th Ed) p 461, has stated as follows: B

> Bail should not be refused on the ground that the accused have been sentenced to a long term of imprisonment or that the granting of bail has a tendency to increase the number of appeals and of protracting the appellate proceedings. The discretion vested in the Court to grant bail should be judiciously exercised in accordance with the principles laid down by the Statutes on the facts of each particular case. C

In *PP v Dato Seri Anwar Ibrahim (No 3)* [1999] 2 MLJ 1, Augustine Paul J approached the issue as follows (at p 233): D

> The defence applied for a stay of execution pending appeal and referred to me cases such as *Re Kwan Wah Yip & Anor* [1954] MLJ 146 and *Ganesan v PP* [1983] 2 MLJ 369. The prosecution relied on the same cases in opposing bail. In considering the application, I took into account factors such as the seriousness of the offences for which the accused has been found guilty and the defence advanced which consisted of after-thoughts and the attempted use of tampered evidence. Accordingly, I dismissed the application. E

The reported cases concerning the application for a stay under s 311 of the CPC (and s 279 of the CPC — in *Suhaili*'s case) of the Code following a conviction are *Tan Tee v R* [1948] MLJ 153, *Re Kwan Wah Yip & Anor* [1954] MLJ 146, *Suhaili bin Hj Chuchu v PP* [1983] 2 MLJ 424 and *Ganesan v PP*. *Suhaili bin Hj Chuchu v PP*, a decision in respect of the Brunei CPC, it was held an application for bail pending appeal may be made at any time. In *Tan Tee v R* it was held it has always been the practice in this country for Magistrates to grant bail unless the magistrate has very good reasons for not allowing it. In *Re Kwan Wah Yip & Anor*, Spenser Wilkinson J had opportunity to further consider the issue. He averred to the conflict of authority on the subject of granting bail pending appeal and held, adopting the approach in the unreported decision of Wilson J in *Doraisamy s/o Palanimuthu v PP* (High Court Kuala Lumpur Criminal Appeal No 2 of 1954) that a stay of execution should not be granted unless there are special reasons for so doing, and the mere reason that a notice of appeal has been filed is no sufficient reason. The considerations to guide the grant of a stay of execution pending appeal were: F G H

(1) gravity or otherwise of the offence;

(2) the length of the term of imprisonment in comparison with the length of time which is likely to take for the appeal to be heard; I

(3) whether there are difficult points of law involved;

(4) whether the accused is a first offender or has previous conviction;

(5) whether the accused would become involved again in another offence whilst at liberty; and

(6) whether the security imposed will ensure the attendance of the appellant before the appellate court.

These were the same considerations set out by Mohamed Dzaiddin J (as he then was) in *Ganesan v PP.*

Of particular pertinence to this application is the quote in *Re Kwan Wah Yip & Anor* from the decision of Wilson J in *Doraisamy s/o Palanimuthu v PP* in reference to s 305 of the Criminal Procedure Code (Cap 21) which is in substance similar to s 311 of our CPC:

> Obviously the court or the judge has a discretion. In my view, a stay of execution should not be granted and will not be granted by me unless there are special reasons for so doing, and the mere fact that a notice of appeal has been given is no sufficient reason. The only other reason given in this case is that the applicant who has been advised verily believes he has good reasons for appeal. That, also in my view does not constitute grounds for releasing an appellant pending appeal.
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> The approach by Wilson J is eminently sensible. Every appellant in any case believes he has good reasons for appeal. If that is the criteria, then every application for bail would be granted, there is in practice no judicious exercise of discretion and there is no purpose in s 311. An applicant must therefore show the grounds and particulars for his good reasons for appeal, so that the court to which the application is made is able to decide for itself whether the applicant has good reasons: (a) for his appeal, and (b) for releasing him pending appeal. The second decision necessitates a decision, without deciding finally on the issue, whether the grounds stand a good chance of success. It was submitted by Mr V Sithambaram that failure for the prosecution to object meant that the prosecution had not shown any grounds in the public interest, why bail pending appeal should not be granted. That argument is clearly not sustainable in the light of the above authorities.

The affidavit in support of the application sets out the grounds as follows:

(1) Saya adalah pemohon dalam notis usul ini.

(2) Saya mengikrarkan afidavit ini dari pengetahuan saya sendiri dan dari maklumat dan dokumen-dokumen yang berada dengan saya dan peguam saya, En Kulasegaran a/l SA Shunmugam d/a Tetuan S Kula & Co, Suite 501, Tingkat 5, Wisma Lal Doshi, 135, Jalan Tuanku Abdul Rahman, 50100 Kuala Lumpur. Afidavit ini difailkan oleh pihak pemohon.

(3) Saya pada masa ini tidak bekerja.

(4) Saya adalah tertuduh dalam kes ini dan perbicaraan telah selesai bagi kes ini dalam Mahkamah Majistret 1B Kuala Lumpur. Dua pertuduhan telah dibuat terhadap saya di bawah s 199 Kanun Keseksaan.

(5) Saya telah disabit pada 25 April 2000 dan dihukum penjara selama tiga tahun dari 25 April 2000 untuk setiap satu daripada pertuduhan tersebut di atas yang mana hukumannya akan berjalan secara serentak.

(6) Saya telah memohon untuk penangguhan pelaksanaan hukuman dan permohonan tersebut telah ditolak oleh Puan Majistret pada lebih kurang 4.45 petang.

(7) Saya telah masuki notis rayuan terhadap keputusan Puan Majistret tersebut dan notis rayuan telah difailkan pada 26 April 2000. Satu salinan notis rayuan adalah dilampirkan dan ditunjukkan kepada saya dan ditandakan eksh 'A'.

(8) Dengan ini saya pohon satu penangguhan pelaksanaan hukuman tersebut hingga keputusan muktamad rayuan. Jika penangguhan pelaksanaan tidak diberi oleh mahkamah yang mulia ini saya akan menghadapi kesusahan dan prejudis.

(9) Pada lebih kurang pukul 4.30 petang Puan Majistret membaca alasan ringkas keputusan.

(10) Saya juga katakan bahawa saya telah diperintah untuk membela diri oleh Augustine Paul H, hakim Mahkamah Tinggi dengan ini saya telah membela diri bermula pada 10 April 2000 dan perbicaraan ini pada peringkat pembelaan telah berlanjutan sehingga 25 April 2000. Pembekalan rekod rayuan, nota-nota keterangan akan mengambil masa yang panjang. Jika rayuan saya didengarpun saya adalah diprejudiskan dengan menjalani hukuman penjara dari hari ini sehingga pendengaran dan keputusan dalam rayuan saya ini.

(11) Saya dinasihati dan percaya bahawa rayuan saya mempunyai merit-merit seperti berikut:

(a) saya dinasihati dan percaya bahawa intipati-intipati tuduhan dibawah s 199 Kanun Keseksaan tidak dibuktikan khususnya:

(i) bahawa mahkamah undang-undang adalah terikat atau diberi hak supaya menerima deklarasi tersebut sebagai keterangan; dan

(ii) bahawa penyataaan tersebut adalah tidak benar; dan

(iii) bahawa apabila membuat penyataan yang tidak benar itu, tertuduh mengetahui bahawa penyataan tersebut adalah tidak benar, atau tertuduh percaya bahawa penyataan tersebut adalah tidak benar atau tertuduh tidak percaya bahawa penyataan tersebut adalah benar.

(b) DW2 dan DW3 telah memberi keterangan yang boleh memusnahkan intipati pertuduhan ini.

(c) kes ini patut didengar oleh majistret yang sama yang telah melepaskan dan membebaskan saya pada akhir kes pendakwaan. Tambahan pula, saya tidak dibenarkan untuk memanggil semula saksi pendakwaan yang material yang telahpun memberi keterangan di hadapan majistret yang lain dan perbuatan tidak memanggil semula saksi ini adalah melanggar peruntukan s 261 Kanun Acara Jenayah.

(d) adalah penting juga diperkatakan bahawa majistret yang telah mendengar dan menyelesaikan kes saya sebelum saya diperintahkan supaya membela diri, telah membuat satu kesimpulan bahawa keterangan yang telah diberikan oleh 'SP-1', yang merupakan saksi yang paling penting bagi pihak pendakwaan, adalah mengelirukan dan menimbulkan keraguan.

(e) Majistret yang telah mendengar dan menyelesaikan kes ini tidak mempunyai peluang untuk mendengar keterangan saksi-saksi yang material dan membuat penilaian daripada tingkah laku dan keterangan mereka berkenaan kredibiliti mereka sebagai saksi.

(f) pembelaan saya telah dibuat diatas sumpah dan disokong dengan dua orang saksi yang independen dan beberapa dokumen-dokumen awam (public documents) seperti kad pengenalan dan paspot antarabangsa saya, yang saya dinasihati dan percaya menunjukkan ketidak kesalahan saya.

(g) saya juga dinasihati dan percaya bahawa kes ini melibatkan perkara undang-undang yang rumit (difficult points of law) dan adalah perkara yang melibatkan kepentingan awam (public interest).

(12) Saya juga mempunyai banyak lagi alasan-alasan rayuan yang saya tidak dapat huraikan kerana kesuntukan masa.

(13) Saya mempunyai seorang bayi perempuan berumur 19 bulan. Bayi tersebut dilahirkan 'premature'.

(14) Salinan pertuduhan-pertuduhan yang saya hadapi dan atas mana saya disabit kini dilampirkan dan ditunjukkan kepada saya dan ditandakan eksibit 'B1' dan 'B2'. Bersama-sama ini juga kini dilampirkan dan ditunjukkan kepada saya alasan keputusan bertarikh 15 Disember 1999 yang ditandakan sebagai eksh 'C' ('alasan keputusan tersebut'). Saya memohon maaf daripada mahkamah yang mulia ini kerana alasan keputusan tersebut mempunyai beberapa garisan dan tanda-tanda yang telah dibuat oleh peguam saya. Oleh kerana kesuntukan masa, saya tidak dapat memberi mahkamah yang mulia ini satu salinan bersih alasan keputusan tersebut.

(15) Saya katakan bahawa pada lazimnya, penangguhan pelaksanaan penjara sentiasa diberi oleh mahkamah yang mulia sehingga rayuan terhadap sabitan dan hukuman didengar dan diputuskan.

(16) Saya juga memberi akujanji bahawa saya akan menghadiri mahkamah yang mulia ini pada bila-bila masa yang perlu.

(17) Saya juga dikehendaki hadir di Mahkamah Tinggi Kuala Lumpur pada 30 Mei 2000 yang melibatkan satu kes sibil.

(18) Rayuan tersebut juga akan menjadi akademik, 'futile' dan 'nugatory' dan tidak berfaedah jika saya berjaya dalam rayuan ini, sekiranya penangguhan pelaksanaan tidak diberi terhadap hukuman penjara yang diperintah oleh Puan Majistret.

(19) Saya juga katakan bahawa hukuman penjara selama tiga tahun terhadap saya adalah terlalu lebih hukuman (manifestly excessive). A

(20) Saya dinasihat dan katakan ada kemungkinan besar bahawa rayuan saya dibenarkan atau hukuman diketepikan dan diganti oleh 'tidak bersalah'.

(21) Saya pohon bahawa saya diberi peluang untuk menegakkan keadilan dengan diberi jaminan sehingga rayuan diputuskan oleh mahkamah yang mulia ini. B

(22) Dalam keadaan dan alasan-alasan ternyata di sini saya dengan rendah diri pohon perintah seperti di pohon disini.

Paragraphs 1 to 7 sets out the background. Paragraph 8 avers that if a stay is not granted she will face difficulty and prejudice. However, she did not specify what difficulty or prejudice she would suffer if stay is not granted so as to enable the court to decide if it is true. Paragraph 9 appears to be of no relevance on its own. The averment of prejudice in para 10 occurs and is true only if the appeal against conviction or appeal against sentence is successful, an assumption that cannot be made. The averment in para 11(a) is a repetition of arguments before the magistrate who upon hearing and consideration of all of the evidence has made a decision. As such it serves little purpose, since this court cannot decide upon that issue without the appeal record before it. Paragraph 11(b) bears a similar defect. C D

The averment in para 11(c) raises an issue upon the operation of s 261 of the CPC. A recall of prosecution witnesses would be important if a decision has not been made to call for the defence. In this case a decision has been made to call for the defence has been made. Indeed it was made by the High Court upon an appeal. The learned magistrate was therefore at the stage of hearing the defence, and not the prosecution. In my view s 261 of the CPC was no longer the operative provision, but that after hearing the defence witnesses, the defence or prosecution could make an application under s 425 of the CPC if the court is satisfied the recall and re-examination of such person is essential to the just decision of the case. E F

Paragraph 11(d) referred to the decision of the previous magistrate who said that the evidence of SP1 was confusing and raised doubts. The para is misleading in that it did not deal with the fact that the decision of the previous magistrate has been overruled by the High Court on appeal, and while the overruled judgment was exhibited, the judgment of the High Court was omitted. It must be remembered at all times that the duty is upon the applicant to satisfy the court that the stay ought to be granted. It is therefore upon the applicant to exhibit the judgment of the High Court and to show that the latter accepted the conclusion of the previous magistrate in respect of the evidence of SP1. Accepting that SP1 was the most important prosecution witness leads to the inference that the High Court must have rejected the conclusion in respect of SP1 in overruling the previous magistrate's acquittal. G H I

In the light of the above reasoning, the issue raised in para 11(e) ceases to be good reason. If the appellate court could decide to call for the defence

A on the basis of the record of proceedings as at the end of the prosecution case, there was no reason the learned magistrate hearing the defence case cannot rely on that record and the decision of the High Court. If the learned magistrate had doubts over the prosecution evidence because she has not heard them, the learned magistrate would be correct to have acquitted the accused. In an adversarial system, the solicitor for the accused and the B deputy public prosecutor must, at the end of the case whether, in view of the fact the magistrate at the defence stage has succeeded another magistrate who heard the prosecution case, decide whether to apply under s 425 to recall and re-examine those witnesses whose re-examination is essential to the just decision of the case. Their submissions in that regard C will assist the learned magistrate and even an appellate court to decide if the re-call and re-examination is essential. But the mere fact the magistrate at the defence stage is different from the magistrate at the prosecution stage, of and by itself, is not a determining consideration. The real issue, to which no averment is made, is whether the credibility of the witnesses were in fact serious issues that would affect the outcome of the case, and whether their D demeanour were relevant to that issue of credibility.

Paragraph 11(f) refers to the applicant's identity card and international passport, from which I infer she is referring to her name on the said documents. But there is no particulars in the averment to show how that fact affects the accusation of making a false declaration that Sharma Kumari Shukla is not her name since a person is not prevented from having and E using other names.

Paragraph 11(g) alludes to involvement of difficult points of law of public interest, but also fails to state what those points of law are. It is impossible then to decide what the points of law are, and the applicant remains as having failed to satisfy the court whether those points of law are F good grounds for the grant of a stay.

Paragraph 12 fails for the same reason as para 11(g). The ground in para 13 is the same as that ordinarily considered upon humanitarian grounds in considering an appropriate sentence, and is not on its own a determining factor: see *PP v Loo Choon Fatt* [1976] 2 MLJ 256.

G Paragraph 14 places reliance upon the judgment of the previous magistrate but falls far short by failing to mention that that judgment had been set aside upon appeal and by the failure to exhibit a copy of the judgment of the High Court ordering the defence to be called. The applicant has not been candid with the court.

H Paragraph 15 is not founded upon good law as the principle had been rejected since *Re Kwan Wah Yip & Anor* and *Ganesan v PP*.

Paragraph 16 is an adjectival ground in the sense it is a ground considered if other grounds establish there are good reasons for a stay. The mere fact one has money to ensure attendance does not justify a stay of a sentence of imprisonment if there are otherwise no other good grounds for I a stay. Paragraph 17 is not a good ground since a prisoner can be produced in court upon a court order. Paragraph 18 presupposes that an appeal would be successful, and if the applicant fails to show there are good grounds for

an appeal, this ground is irrelevant. Paragraph 19 asserts that the sentence is manifestly excessive but gives no particulars why the applicant came to that conclusion. Similarly para 20. Paragraphs 21 and 22 are formalities and do not add to the application.

Applicants by notice of motion would serve their interests better by observing the requirements of O 8 r 3(1) of the Rules of the High Court 1980 which specifies the use of Form 9. The assertions in the supporting affidavit as grounds ought to be set out in the notice of motion itself. If this is followed, then it obviously follows that the supporting affidavit will set out the evidence supporting those assertions in the grounds in the notice of motion, and the application will not run aground as in this case. It is also well to remember that in an application for a stay of sentence pending appeal, there is no guarantee the appeal will be successful, and the application is made in the shadow of a judgment of a court. Section 114 illustration (e) of the Evidence Act 1950 allows a court to presume that judicial acts have been regularly performed. Thus unless it is set aside by a successful appeal, that judgment remains valid and in force. In such circumstances the burden is clearly upon the applicant to show that there are good grounds why a stay ought to be granted against that courts' order. It is not a burden that is lightly discharged by assertions not backed up or supported by evidence.

It was submitted by Mr V Sithambaram for the applicant that the offence under s 199 of the CPC and punishable under s 193 of the CPC is a bailable offence, and bail ought to be granted. He supports this argument by referring to *PP v Dato Seri Anwar Ibrahim* [1998] 4 MLJ 481 and *Balasingham v PP* [1959] MLJ 193 and submitting that if bail should be granted at the trial, it should be granted upon an appeal. Intriguing as the argument may be, it would be stretching the meaning of continuation of a trial, to a retrial or rehearing. That is not the case, since until an appeal succeeds and the judgment and order of the court appealed from has been set aside, that order remains an order of the court, and humble as a magistrate's court may be, it is a court of law, and its order remains valid, in force and must be respected, even by an appellate court, who can only interfere with a decision only if the lower court has erred, or its sentence is found to be manifestly inadequate or excessive.

For the reasons above I had dismissed the application for a stay of execution of the sentence of imprisonment.

Application for a stay of execution of the sentence of imprisonment dismissed.

Reported by Jafisah Jaafar